Supreme Court, U.S.
FILED
JUN 25 1999
CLERK

No. 98-1747

IN THE

Supreme Court of the United States

ROSALINDA L. PEREZ, *et al.*,

Petitioners,

v.

PASADENA INDEPENDENT SCHOOL DISTRICT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

When determining minority voting strength under the test of *Thornburg v. Gingles*, 478 U.S. 30 (1986), may a plaintiff's case rest on estimates of voting age population that include substantial numbers of non-citizens who are ineligible to vote, or must the plaintiff demonstrate voting strength on the basis of eligible voters, at least where the defendant has demonstrated that a substantial percentage of the plaintiff class are not citizens?

When determining minority voting strength under the test of *Thornburg v. Gingles*, 478 U.S. 30 (1986), may a plaintiff's case rest on the use of "influence districts" to overcome the fact that the plaintiff's proposed districts do not contain an actual majority of eligible voters, at least where the defendant has demonstrated that a substantial percentage of the plaintiff class are not citizens?

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

The following are the current members of the Board of Trustees of Pasadena Independent School District:

Mr. Fred Roberts

Mr. Bob Blair

Mr. Marshall Kendrick

Mrs. Vickie Morgan

Mrs. Carmen Orozco

Mrs. Nelda Sullivan

Mr. Ted Sullivan

The Superintendent is Dr. Frederick H. ("Rick") Schneider.

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ORDERS BELOW

The order of the Fifth Circuit Court of Appeals is reported at 165 F.3d 368 (5th Circuit 1999), and is set forth in Petitioners' Appendix A, pages 1a-15a. The District Court's Order of March 13, 1997 is reported at 958 F. Supp. 1196 (S.D. Tex 1998), and is set forth in Petitioners' Appendix B, pages 16a-87a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on January 29, 1999. Petitioners invoke 28 U.S.C. § 1254(1), which provides for review by the Supreme Court by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

STATUTORY PROVISION INVOLVED

The statutory provision involved in this case is Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, the text of which is reprinted in Respondents' Appendix at App. A.

STATEMENT OF THE CASE

On March 13, 1997, the District Court entered its Memorandum and Opinion, the subject of this appeal. In this voting rights case, petitioners challenged the at-large voting system for electing members of the school board for the Pasadena Independent School District ("PISD"). Petitioners contend that the current system dilutes the votes of politically cohesive Hispanics in the PISD, in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973,

et seq. In applying *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986), the district court found that Petitioners failed to establish the first element of the *Gingles* threshold factors because they did not show that it was possible to draw one or more districts in the Pasadena I.S.D. with a majority Hispanic citizen voting age population. (Pet. App. 4a, 6a). Petitioners argued that it was possible to develop a plan for seven single-member districts using 1990 census data (the "Korbel Plan"). District 1 of the Korbel Plan contained 55.07 percent of Hispanic voting-age population and District 6 contained 50.04 percent Hispanic voting-age population. (Pet. App. 30a). The Korbel Plan did not take into account the citizenship of the voting-age Hispanics. (Pet. App. 30a). The court found that using the 1990 census data, none of the districts in the proposed plans had a Hispanic voting-age population of at least 62.1 percent, or a citizen voting-age population of at least 50 percent. (Pet. App. 37a) The court also found that the Korbel Plan proposed districts were irregularly shaped, and evidenced a lack of geographic compactness. (Pet. App. 37a). The un-rebutted testimony of Respondent's expert, Dr. John Alford, was that the Korbel Plan had a population deviation of approximately 32 percent. (Pet. App. 38a). The district court found that the proposed districts were flawed by a citizenship population of less than 50 percent, a population deviation of over 10 percent, and irregular shapes. (Pet. App. 38a). The district court found that the Hispanic community in the PISD is politically cohesive. (Pet. App. 66a). The district court believed that in determining whether racial polarization is present in a particular election, a court should distinguish between the serious candidates and the non-serious candidates. (Pet. App. 67a-68a). The district court found that in the analysis presented to the court by petitioners that they did not attempt to distinguish "serious" candidates

from non-serious candidates on any basis. (Pet. App. 68a). The district court did not decide whether the absence of white votes for Hispanic preferred candidates is the result of racial polarization or of the absence of serious minority candidates. (Pet. App. 85a). The court found that because Petitioners cannot meet the first Gingles threshold, they have not established that they "do not have an equal opportunity to participate in the political process and to elect candidates of their choice"; that the at-large election system used by the PISD denies or abridges their right to vote on account of their race, color, ethnicity; or that the at-large election system dilutes the vote of minorities or minimizes their electoral influence, in violation of their civil rights. (Pet. App. 86a).

The Pasadena Independent School District is governed by a seven member Board of Trustees. (Pet. App. 3a). All Trustees are elected on a non-partisan basis, by numbered posts, for overlapping three-year terms so that in one year two will be elected. There is one Hispanic presently serving on the Board and she is beginning her fifth term. No African American has run for the board since 1986. There have been no appointments of any persons regardless of color or ethnicity to the school board. The only incumbent on the school board who has ever been defeated ran against an individual who had previously served on the school board. Respondents believe that of the Hispanics who have run for the PISD school board, only two of these candidates could be considered serious candidates. One of these serious candidates, Carmen Orozco, is now serving her fifth consecutive term. At the time the case was heard by the district court, PISD had four polling places.[1]

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1. The PISD Board of Trustees voted in October of 1997, to voluntarily increase the number of polling places to ten (10) plus (Cont'd)

The Fifth Circuit Court of Appeals affirmed the decision of the district court and found that the district court correctly required that plaintiffs demonstrate that Hispanics would represent a majority of voting age citizens in a proposed district. (Pet. App. 10a).

REASONS FOR DENYING THE WRIT

This case presents a substantial question involving the application of citizenship to Section 2 of the Voting Rights Act as it relates to satisfying the first *Gingles* threshold element. The rule applied by the Fifth Circuit on this issue is not new but has evolved in the Fifth and other circuits without the benefit of clear guidance from the Supreme Court. It is clear from many of the reported decisions in the various circuits that have faced this issue, that these circuits would benefit from a clear and concise decision in this case. In *Barnett v. City of Chicago*, 141 F. 3d 699, 702 (7th Cir. 1998) "the court was not even certain whether in making the threshold inquiry the court should use total population, voting-age population, or voting-age population of citizens only." While this Court did not have to reach this issue in

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(Cont'd)
increase the number of early voting places from one (1) to four (4). Despite the suggestion at trial that the small number of polling places was reducing Hispanic turnout, the increase in the number of polling places for the 1998 school board elections did not raise the Hispanic share of the turned-out vote. In 1997, the most recent election held with four polling places, analysis of sign-in sheets showed that 7.4 percent of the voters had Hispanic surnames. Over seven elections from 1987 to 1997 (all with four polling places), the average Hispanic share of the turned-out vote was 7.1 percent. The same analysis for 1998 (with ten polling places, and an Hispanic candidate running for one of the two places in the election) showed that only 6.2 percent of the voters had Hispanic surnames.

Johnson v. De Grandy, 512 U.S. at 1008-09, the issue of citizenship is central to the case at hand. Absent clear guidance, lower courts have had to speculate as to what factors and evidence should be considered and relied upon in making the first Gingles threshold inquiry. Despite lack of guidance from this Court, the Fifth Circuit has property applied the correct legal standard when considering the issue of citizenship in determining the first *Gingles* threshold.

I.

THE PETITION MISREPRESENTS THAT THE HOLDING BY THE FIFTH CIRCUIT CREATED A NEW RULE FOR EVALUATING WHETHER OR NOT THE PLAINTIFFS SATISFIED THE GINGLES I THRESHOLD.

Petitioners allege that the decision by the Fifth Circuit established a New Rule for evaluating Plaintiffs' evidence on the Gingles I threshold factor which forecloses Section 2 challenges in an important class of cases. Respondents believe that this statement constitutes a misrepresentation of the holding of the Fifth Circuit or a misreading of the Fifth Circuit's decision by Petitioners. The Fifth Circuit in this case followed the same standard that it has followed in the previous cases that were before the court which focused on whether Section 2 plaintiffs could establish that they possessed the ability to elect candidates of their choice absent the challenged structure. The first case in which the Fifth Circuit addressed the issue of citizenship was *Campos v. City of Houston*, 113 F.3d 544, 548 (5th Cir. 1997). In *Campos* the court held that courts "must consider the citizen voting age population of the group challenging the electoral practice when determining whether the minority group is

sufficiently large and geographically compact to constitute a majority." *Campos*, 113 F.3d at 548. The decision of the Fifth Circuit in this case is but an expansion and evolution of the decision of the Fifth Circuit in *Westwego Citizens v. City of Westwego*, 946 F.2d 1109 (5th Cir. 1991). In *Valdespino v. Alamo Heights Independent School District*, 168 F.3d 848 (5th Cir. 1999), the Fifth Circuit, in interpreting *Westwego II's* statement, held "in context, *Westwego II's* statements did not alter what must be proved, only what can be used to prove it. The Hispanics still must meet their burden of proving that Hispanics constitute more than 50% of the relevant population in their demonstration district." The Fifth Circuit in *Valdespino* further "rejected the appellants' contention that a "majority" may be less than 50% of the citizen voting age population ." *Valdespino*, 168 F.3d 848 at 850.

Contrary to the assertions made by Petitioners, the Court of Appeals in this case did not adopt a "bright-line" test that may only be met by showing with census data that Hispanics exceed 50% of the citizen voting age population of the demonstration district submitted by plaintiffs to satisfy their burden under *Gingles I*. The district court and the Court of Appeals considered plaintiffs' evidence regarding elections in similar districts and the projected growth of the Hispanic population, but the district court found plaintiffs' projections unreliable. (Pet. App. 11a). What the district court did say was "this Court does not find the projected population growth estimated by plaintiffs to be sufficiently reliable to overcome the presumption of census accuracy". (Pet. App. 47a). The district court further found that Respondents expert, Dr. John Alford's testimony and criticism of plaintiffs' population projections to be credible. (Pet. App. 46a). In *Valdespino*, the Fifth Circuit

affirmed the decision of the district court in allowing the defendant school board to use evidence to counter the Plaintiffs' census data because the district court found that the school board's 1997 population data overcame the 1990 census figures. *Valdespino*, 168 F.3d at 854. It is misleading for Petitioners to suggest or imply that the district court and the Court of Appeals excluded other evidence presented by Petitioners to show the "geographic insularity" requirement of *Thornburg v. Gingles*. The flexibility of the Fifth Circuit is further demonstrated in Note 18 of *Valdespino*, "it is sufficient to conclude that there has been significant demographic changes [sic] since the decennial census and that there exist [ ] post-decennial population data that more accurately reflect [ ] evidence of the current demographic conditions." It also appears that Petitioners have either misinterpreted what the Fifth Circuit meant by the term "bright line test" or they are deliberately trying to mislead this Court. In *Valdespino*, 168 F.3d at 852, the Fifth Circuit held that "it interpreted the *Gingles* factors as a bright line test. Each factor must be proved before it is necessary to proceed to the totality of the circumstances test."

Petitioners have also challenged and called into question the reliability of the citizenship census data because it is based upon sample data, rather than the actual headcount used for redistricting. The objections to the use of the census citizenship data are without merit. The one-in-six sample used for most of the census questions is an extremely large sample. A typical national sample for a research study or public opinion poll consists of fifteen hundred to twenty-five hundred respondents. The census sample exceeds ten million respondents. In fact, it is the largest sample for any survey conducted anywhere in the world. (Tr. Vol. VI,

p. 62). There is no question that because the citizenship information is based upon a sample population, it cannot be as precise as the census data, which is based upon the entire population. However, the use of sample data is a long standing statistical technique, whose limits are known and measurable. This Court should not reject the citizenship statistics solely because they are based on sample data without some indication that the sample data is tainted in some way. There were no arguments presented by Petitioners before the district court or the Court of Appeals that the sample was skewed in a statistically significant way due to improper sampling method, small sample size, or sheer random error. Much of the evidence presented and relied upon by Petitioners in this, and other VRA cases comes from this same census sample, including data on income, employment, and education differences affecting minorities. All of those statistics also came from sample data and were gathered in exactly the same manner as the citizenship census data. Petitioners should not be allowed by this Court to take inconsistent positions by touting the sample data when it suits their purposes and then dispute the validity of the sample census data when it does not. Petitioners have also failed to cite any legal or expert authority which would lend credence to their attack on the reliability of the citizenship census data. When Respondent's expert, Dr. John Alford, was asked directly if there were any documents, surveys, cases or anything else which cast a shadow upon the reliability of the information contained in the STF-3 file, he said that "he was not aware of any." (Tr. Vol. VI, p. 72). The testimony of Respondent's expert, Dr. John Alford, regarding the reliability of the citizenship census data, was not rebutted or challenged by Petitioners or their experts. Moreover, as pointed out at trial, the census measure of citizenship is a

conservative one, with any net error working in favor of the plaintiffs. Non-citizens tend to inaccurately report that they are citizens for several reasons. Permanent legal residents (including those who have applied for, but not yet received citizenship) may report themselves as citizens to indicate the permanent and legal status of their residence here. Those non-citizens here illegally may fear the consequences of reporting their non-citizen status to the federal government, despite the efforts of the Census Bureau to assure respondents that the information will not be passed to the INS. There are no countervailing forces that would make citizens likely to report that they are non-citizens. Thus, these systematic errors favor the plaintiffs in these cases by inflating the citizen count.

The argument that the citizenship data can not be made available in a timely fashion is also without merit.[2] The production of the appropriate data in the early 1990s was delayed largely because the data tables that reported citizenship by race and ethnicity were produced by the Census Bureau only on request, and not as a part of the routine STF-3 data release. There is nothing to hinder the routine inclusion of such tables in the standard census data release. Similarly, the argument that citizenship data is not appropriate for redistricting use because it is available at the block-group level rather than the block level, is without merit. (Tr. Vol VI, pp. 65-66). Block level data can easily

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2. The United States Census Bureau expects to release the "long form" data, including the citizenship data, during the period from June through August of 2001. (Census 2000 Operational Plan, January 1999, U.S. Dept. of Commerce, page 84). This is only a few months after the April 1 release deadline of the P.L. 171-94 basic redistricting data, not "several years" as alleged by the petitioners. (p. 7).

be estimated from the block-group data if need be, and in any case, drawing districts block by block is a process that has been viewed with disfavor by the courts. *Bush v. Vera*, 517 U.S. 952, 961. Further, the fact that citizenship data is only available at the block group level, without proof that this will cause the data to be tainted and unreliable, should not cause this Court to reject the data.

Moreover, even if there was merit to any of these concerns, they could easily be alleviated. The citizenship data, if deemed useful, could simply be moved from the sample to the full-count form of the census. The distinction between topics included in the full count data (termed the 'short form' by the Census Bureau) and the one-in-six sample data (termed the 'long form' by the Census Bureau) has been fairly fluid over time. Prior to the 1950 census, everyone received the long form. The move to a sample of the population for the long form began with the 1950 census, and various questions have been moved between the two forms in each subsequent census. As recently as the 1990 census, the short form included such questions as marital status, housing value, and rent paid. For the 2000 census the short form will, for the first time, contain only questions where data are both needed in response to legislative requirements and required at the block level. Thus by this new standard, citizenship data would be shifted to the short form if it were deemed useful for redistricting purposes.

Census data must be used unless someone comes forth with more reliable data. *McNeil v. Springfield Park District*, 851 F.2d 937, 946 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031, 109 S. Ct. 1769, 104 L. Ed. 2d 204 (1989). Census figures are presumed accurate until proven otherwise. Proof of changed figures must be thoroughly documented, have a

high degree of accuracy, and be clear, cogent and convincing to overcome the presumptive correctness of the prior decennial census. *Valdespino*, 168 F.3d at 854.

The Korbel Plans submitted by Petitioners' expert, George Korbel, were irregularly shaped, evidencing a lack of geographic compactness, and also violated the one man-one vote principal. (Pet. App. 37a). *See Reynolds v. Sims*, 377 U.S. 533, 567-68, 84 S. Ct. 1362, 1384-95, 12 L. Ed. 2d 516, *reh'g denied*, 379 U.S. 870, 85 S. Ct. 12, 13 L. Ed. 2d 76 (1964). This Court has ruled that any deviation exceeding 10% is a prima facie violation of the one man one vote principal, creating a burden on the jurisdiction to justify the deviation. *Brown v. Thomson*, 462 U.S. 835, 842, 43, 103 S. Ct. 2690, 2696, 77 L. Ed. 2d 214 (1983). However the resulting justification cannot be for the reason of enhancing the political strength of a particular group. *Sims*, 377 U.S. at 577, 84 S. Ct. at 1389. During the trial in the district court no reason was advanced by Petitioners to justify the population deviations in their proposed plans in excess of 10% and the rationale behind their irregular shapes.

Petitioners have also asserted that the "plaintiffs established through election data that the submitted districts provide Hispanics with the potential to elect candidates of their choice." (Pet. 8). Petitioners have failed to attach any evidence to support this statement and Respondents do not believe that when citizenship is taken into account any such evidence exists. To include persons ineligible to vote on account of non-citizenship in the statistical pool would significantly overstate the degree of Hispanic electoral potential. *Burns v. Richardson*, 384 U.S. 73, 92-93 (1966).

II.

THE PETITION MISREPRESENTS THAT THE OPINION BY THE FIFTH CIRCUIT CONFLICTS WITH THE DECISIONS OF THIS COURT AND THOSE OF OTHER CIRCUITS.

Petitioners allege that the opinion by the Fifth Circuit is in conflict with the decisions of this Court and those of other circuits. Respondents believe that this statement is very misleading in that Petitioners have failed to cite one case either by this Court or any other circuit that is directly on point. This Court has thus far declined to answer directly the question of "which characteristic of minority populations (e.g., age, citizenship) ought to be the touchstone for proving a dilution claim." *Johnson v. De Grandy*, 512 U.S. 997, 1008, 114 S. Ct. 2647, 2656, 129 L. Ed. 2d 775 (1994). *Negron v. City of Miami*, 113 F.3d 1563, 1569 (11th Cir. 1997). The Petitioners in this case apparently contend that the holding in *Solomon v. Liberty County, Florida*, 899 F.2d 1012, 1018 n.7 (11th Cir. 1990) requires that voting age population statistics be used in Section 2 analysis instead of voting age citizenship population statistics. Of course, *Solomon* did not address that issue, because there was no indication in that case that there was any disparity between black and white citizenship rates. *Negron*, 113 F.3d at 1568. The holding in *Solomon* does not preclude a holding by this Court in this case that refinement with citizenship data is appropriate, where that data is available and indicates a significant difference in the citizenship rates of the majority and minority populations. Both of the opinions by the Eleventh Circuit, in *Solomon* and *Negron* are consistent with each other and the opinion of the Fifth Circuit in this case. The opinion of

the Fifth Circuit is also consistent with the opinions of the Ninth and Seventh Circuits. In *Romero v. City of Pomona*, 665 F. Supp 853, 854 (C.D. Cal. 1987), *aff'd*, 883 F.2d 1418 (9th Cir. 1989) the Ninth Circuit held that courts must consider the citizen voting age population in evaluating the first *Gingles* factor. *See also Skorepa v. City of Chula Vista*, 723 F. Supp. 1384, 1388-89 (S.D. Cal. 1989). As the Seventh Circuit held in *McNeil*, "those ineligible to vote have not expressed a dilution of their vote. They are not parties to a Section 2 claim." 851 F.2d at 945. *See also Barnett v. City of Chicago*, 141 F.3d 699, 704 (7th Cir. 1998), *cert. denied sub. nom., Bialczak v. Barnett*, 118 S. Ct. 2372, 141 L. Ed. 2d 740 (1998).

This Court first elaborated on what a minority group challenging an at-large election system must prove under Section 2 of the Voting Rights Act in *Thornburg v. Gingles*, 478 U.S. 30 (1986). In determining whether voter dilution has occurred, the *Thornburg* Court held that the minority Plaintiff must meet three preconditions to show that an at-large election system, as in the instant case, can be held to be dilutive of the right of any citizen of the United States to vote. The plaintiff must prove geographic compactness, political cohesiveness, and racial bloc voting to show that an at-large election system violates Section 2 of the Voting Rights Act.

The first precondition requires the minority group to prove that it "is sufficiently large and geographically compact to constitute a majority in a single-member district. If it is not, as would be the case in a substantially integrated district, the [at-large] form of the district cannot be responsible for minority voters' inability to elect its candidates." *Thornburg*, 478 U.S. at 50-51, 106 S. Ct. at

2766. This Court reasoned that this factor was important to show that the minority group had the potential to elect candidates of their choice absent the challenged election structure. *Gingles*, 478 U.S. at 50 n.17. The Petitioners further argue that the Supreme Court has disavowed "mechanical" application of the *Gingles* factors. In *Voinovich v. Quilter*, 507 U.S. 146, 158, 113 S. Ct. 1149, 1157, 122 L. Ed. 2d 500 (1993), this Court did say, "the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim."

Petitioners made this same argument in *Valdespino*, 168 F.3d at 852, n.2. This argument was rejected by the Fifth Circuit because it was not relevant to that case, which challenges a multimember district. The *Uno v. City of Holyoke*, 72 F.3d 973, 985-86 (1st Cir. 1995), case cited by Petitioners can be distinguished for two reasons. First, the *City of Holyoke* failed to make the claim in its brief that "the Hispanics, as a group, are insufficiently compact to constitute the majority in a third ward." *Uno*, 72 F.3d at 985 n.20. Second, the citizenship issue was not addressed by the First Circuit in *Uno* and the Court found that Hispanics would constitute a majority of the voters in at least three of fifteen reconstituted wards. *Uno*, 72 F.3d at 986, n.22. The *Uno* court did require that influence districts be considered in Section 2 cases. *Uno*, 72 F.3d at 991, n.34. It appears however, that the Supreme Court cases cited by the *Uno* court lend little or no support for this requirement. Further, the *Uno* court said "before the existence of any influence district is given significant weight in the balance, the evidence must reveal that minority voters in the district have in fact joined with other voters to elect representatives of their choice." *Uno*, 72 F.3d at 991, n.13. The *Sanchez v. State of Colorado*, 97 F.3d 1303 (10th Cir. 1996), case cited

by Petitioners can also be distinguished. First, the Sanchez case is a reapportionment case in which the Plaintiffs challenged the reconfiguration of their state legislative district, Colorado House District 60. Second, the citizenship issue was not addressed by the Tenth Circuit and the Court found that Hispanic population represented as much as 76.8% of Costilla County. *Sanchez*, 97 F.3d at 1314 n.9. In addition, the Tenth Circuit found that the district court "ought to have discussed appellants' statistical evidence more thoroughly because that was the principal evidence they offered and because their statistics had at least surface plausibility." *Sanchez*, 97 F.3d at 1316.

It appears that both the *Uno* court and the *Sanchez* court are confusing the term "fair opportunity to elect" with "potential to elect." If we are looking at the term "potential to elect" we must have a clear understanding of what this term means. As long as the minority seeking to challenge the structure can show that the minority population contains an actual majority of citizens eligible to vote we can determine that it is possible for the minorities to elect their preferred candidate without the assistance of anglo cross-over votes. The further we deviate from requiring a majority the more complex it becomes to determine at what point the minority has the potential to elect their preferred candidates. This is made more complex due to the fact that the number of cross-over voters will change from election to election. If this Court determines that "influence districts" be considered in Section 2 cases, the district court, as the trier of fact, will now be required to determine the number of cross-over voters needed from non-minority voters to determine potential to elect minorities' preferred candidates. We now would have the situation of the "dog chasing his tail." The more racially polarized the anglo voting pattern

the more difficult it becomes to determine the number of cross over votes required to determine potential to elect. The less racially polarized the Anglo voting pattern the easier it will be to determine potential to elect and the more complex it becomes to determine if the minority plaintiffs can satisfy *Gingles III*. If this Court requires that "influence districts" be considered in Section 2 cases, *Gingles I* as we know it will have been drastically amended, modified or rejected. In *Barnett v. City of Chicago*, 141 F.3d 699 (7th Cir. 1998) the Seventh Circuit did not reject the use of citizen voting age population as the exclusive measure for evaluating the plaintiffs' evidence as to the *Gingles I* factor as represented by Petitioners. The *Barnett* court said "we think that citizen voting-age population is the basis for determining equality of voting power that best comports with the policy of the statute." *Barnett*, 141 F.3d at 704, n.5. Petitioners have failed to cite one decision from any circuit, in which non-citizens were a significant part of the relevant population, whose decision conflicts with the decision of the Fifth Circuit in this case.

As the Fifth Circuit observed in *Brewer v. Ham*, 876 F.2d 448, 452 (5th Cir. 1989)

> the raison d'etre of *Thornburg* and of amended Section 2 is to facilitate participation by minorities in our political processes, by preventing dilution of their votes. Only voting age persons can vote. It would be a Pyrrhic victory for a court to create a single-member district in which a minority population dominant in absolute, but not in voting age numbers, continued to be defeated at the polls. Similarly, only voting-age persons who are United States citizens can vote.

A logical interpretation of the Voting Rights Act compels courts evaluating vote dilution claims under Section 2 to consider voting age and citizen voting-age population of the group challenging the electoral practice when determining whether the minority group is sufficiently large and geographically compact to constitute a majority in a single member district. In fact, this Court's language in *Thornburg* frequently refers to minority voters. When, as in this case, non-citizens are a significant part of the Hispanic population residing in PISD, the proper benchmark for the Courts in determining whether or not the plaintiff's have satisfied the *Gingles I* threshold is citizen voting-age population.

III.

THE DECISION OF THE COURT OF APPEALS IS NOT INCONSISTENT WITH THE INTENT OF THE CONGRESS IN THE 1982 AMENDMENTS TO THE VOTING RIGHTS ACT.

Petitioners allege that the decision of the Fifth Circuit is inconsistent with the intent of the Congress in the 1982 Amendments to the Voting Right Act. In *Thornburg*, this Court stated that "the authoritative source for legislative intent lies in the Committee Reports on the bill." *Thornburg*, 478 U.S. at 42 footnote.7[2b]. Petitioners have failed to point out with particularity the provisions of the Senate Report that are inconsistent with the decision of the Fifth Circuit is this case. Further, the Voting Rights Act refers repeatedly to protecting the rights of "citizens" to elect their preferred candidates. In *Thornburg*, this Court, in quoting the Senate Committee, said "there is no requirement that any particular number of factors be proved, or that a majority

of them point one way or the other." *Thornburg*, 478 U.S. at 43. In *Thornburg*, it was this Court that established the necessary preconditions for multimember districts to operate to impair minority voters' ability to elect representatives of their choice. These are commonly known as the "*Gingles*" factors. The Fifth Circuit Court of Appeals did not adopt a formalistic approach in evaluating vote dilution in this case. They said, "The appropriate method for establishing the first *Gingles* factor is a 'matter of fact' which the plaintiff must prove, but there is no 'uniform method.' " (Pet. App. 11a). What Petitioners are in reality seeking, is for this Court to abandon the *Gingles* factors, allow them to create single member districts with a top to bottom deviation in excess of 30%, and not require that the minority group be sufficiently large and geographically compact to constitute a majority in a single member district. (Pet. App. 38a). The creation of an influence district will not create a remedy, but may further frustrate minority voters who were placed in districts where they did not represent an effective majority. Petitioners' proposed "influence districts" provide only the illusion of a remedy. The intent of the Voting Rights Act was to provide actual remedies and not false hope. Instead of packing we would have "fracturing."[3] In *Thornburg*, this Court, in discussing white bloc voting said, " in general, a white bloc vote that normally will defeat the combined strength of the minority support plus white "cross-over votes rises to the level of legally significant white bloc voting." *Thornburg*, 478 U.S. at 34. It appears from this clear language that if the white bloc vote does not defeat

3. "Fracturing" or "cracking" as it is sometimes referred, is the process by which a minority group which could form a sizable minority in one district, is split into two or more districts, where the minority members constitute an ineffective political grouping in each.

the combined strength of the minority support plus white cross-over votes that we do not have legally significant white bloc voting. This would be the situation we would have with "influence districts." If this Court modifies or amends the standard from requiring the minority plaintiff to constitute a majority in a proposed single member district to show that it is feasible if they can influence the election, we would eviscerate both *Gingles I* and *III*.

A minority group cannot claim that it has been injured by the challenged structure unless it constitutes a majority in a single member district. *Thornburg*, 478 U.S. at 46, n.17. As this Court held in *Voinovich*, 113 S. Ct. at 1155, "Districts in which minority voters cannot 'dictate electoral outcomes independently,' but may 'elect their candidate of choice' due to 'sufficient cross-over from white voters' are influence districts, not geographically compact majority-minority districts that satisfy Gingles." The record in this case did not establish that the plaintiffs submitted a reasonable alternative that would afford Hispanics the opportunity to elect candidates of their choice. When citizen voting age population was taken into account neither of the plaintiffs' putative districts contained a majority of Hispanics. The top to bottom deviations exceeded 30% and were irregularly shaped, evidencing a lack of geographic compactness. (Pet. App. 38a). Further, the voting power of the citizens in PISD would be severely diluted if this Court were to allow "influence districts." Section 2 refers to denying citizens the right to vote. No reference is made in the Voting Rights Act that it was intended to protect non-citizens. It is clear that the potential for vote dilution was a primary concern of Congress when it amended Section 2. It is unfortunate however that Section 2 provides no guidance on how to balance the factors and thus determine

whether a challenged plan needlessly impairs a minority group's voting power. *Barnett*, 141 F.3d at 702.

The Fifth Circuits' decision in this case is consistent with the plain language of the Voting Rights Act; consistent with the clear and commonly applied standards of *Thornburg v. Gingles*, and with the decisions of every other circuit in which similar issues have been present and were addressed by the Court.

What the Petitioners are saying is that the application of the *Gingles* Threshold requirements is a mechanical application. Petitioners object that the Fifth Circuit has been applying citizenship in assessing *Gingles I* in a "bright line" or mechanical fashion. If their objection is to clear useful standards by which affected jurisdictions can understand and carry out their obligations under the Voting Rights Act, then this is, in effect, an objection that goes to the very heart of the rule of law. Clear and applicable standards are essential to the proper functioning of the legal system under a rule of law.

If the Petitioners' objection is to the mechanical nature of the application of this standard, then it is a gross mischaracterization of the decisions of the District and Appellate levels mindful of the need to make an intensely local appraisal and application of this Court's standards under *Thornburg v. Gingles*. The district court in this case and the other cited Fifth Circuit cases has made a lengthy and exhaustive inquiry into a host of factors and sources of evidence that bear on each of the *Gingles* factors. In fact, it is in making this local inquiry that the issue of citizenship arises in some but not all of the jurisdictions that have addressed or examined these issues.

It is the Petitioners who would in fact prefer a mechanical application in regard to *Gingles I*. They would require the court to use only total population without regard to local variations in factors such as age, eligibility to vote or citizenship that might affect the local usefulness of such a "mechanical" or "bright line" test.

In rejecting mechanical application of a simple population majority, the Fifth Circuit and other circuits that have addressed this issue, have done what the Petitioners are requesting be done; that is, consider all evidence available to the court in assessing whether or not the minority group in question has the potential to be an effective voting majority in a single member district.

The Fifth Circuit's analysis under *Gingles* was based upon the proper legal standard. The requirement of the Fifth Circuit that Petitioner demonstrate that the Hispanic community be comprised of a group of voting age citizens sufficiently large and geographically compact to constitute a *majority* in a single member district is in keeping with the language of Section 2 of the Voting Rights Act and consistent with the intent of Congress to extend the rights afforded under the Voting Rights Act to *citizens* of the United States. (Pet. App. 34a).

CONCLUSION

The Court should deny the petition for writ of *certiorari.*

Respectfully submitted,

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APPENDIX

APPENDIX A — RELEVANT STATUTE

42 U.S.C. § 1973

Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class affected in numbers equal to their proportion in the population.